

JOINT AND SURVIVORSHIP PROPERTY

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The inventory of the Beavers' estates shows that title to the Beaver residence, purchased by Earl Beaver with his own funds, was taken in the names of Earl and Betty and the survivor of them, and that Earl bought Series E government bonds in the name of Earl or Betty. Furthermore, the Beaver checking account at the bank is in the names of Earl and Betty and their survivor. We have little information about the deposits in this account and withdrawals from it, but we can assume that Earl's salary, dividends and rental income made up by far the greater amount of the deposits, and that both Earl and Betty made withdrawals from the account.

With this background, we can explore the tax effects of what Earl and Betty have done, and then review the advantages and limitations of joint ownership of this kind as an estate planning device.

OHIO LAW

The Ohio Supreme Court has declared that there is no such thing as a tenancy by the entirety in Ohio.¹ By judicial decision, Ohio has evolved the rule that a conveyance to husband and wife without clear words of survivorship creates a tenancy in common.² If an Ohio husband and wife choose to do so, however, they may create a joint tenancy with right of survivorship in real or personal property, and statutes expressly recognize this form of ownership of bank accounts³ and building and loan deposits.⁴ To accomplish this result, express words of survivorship are necessary, with the exception of United States Savings Bonds, as to which the required language is supplied by the regulations under which the bonds are issued.⁵ A good example of a deed which leaves nothing to chance in spelling out a condition of survivorship is that recently reviewed by the Common Pleas Court of Licking County:

It is the intention of this conveyance that the within described real estate shall be the joint property of the Grantor and the Grantee, and owned by them as joint tenants, with the right of survivorship, and not as tenants in common, and upon the

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¹ Tax Commission of Ohio v. Hutchison, 120 Ohio St. 361, 367, 166 N.E. 352, 354 (1929).

² See 28 OHIO JUR. 2D *Husband and Wife* § 70 (1958).

³ OHIO REV. CODE § 1105.06 (1953); Berberick v. Courtade, 137 Ohio St. 297, 28 N.E.2d 636 (1940).

⁴ OHIO REV. CODE § 1151.19 (1953); Schwartz v. Sandusky County Savings & Loan Co., 65 Ohio App. 437, 30 N.E.2d 556 (1940).

⁵ See Treas. Dept. Reg. Circular No. 530 (6th rev. 1945), construed in Estate of John H. Boogher, 22 T.C. 1167 (1954). But see Estate of Silverman v. McGinnes, 259 F.2d 731 (3d Cir. 1958).

death of either of them, all of said real estate shall become the absolute property in fee simple of the survivor.⁶

TAX ASPECTS OF JOINT AND SURVIVORSHIP PROPERTY

Federal Estate Tax

In enacting the first federal estate tax, Congress provided expressly that jointly held property should be taxed in the estate of the joint tenant first to die except to the extent of the property which could be shown to have originally belonged to the survivor or have been purchased by the survivor.⁷ With technical modifications, largely devoted to the problem of transfers without adequate consideration, this is the present rule for estate taxation of joint interests.⁸ The problem of proving the source of funds used to purchase joint and survivorship property, not an easy one under the best of circumstances, is rendered more difficult by the passage of time, the failure of memory, the loss of records and the death of at least one of those who knew most about the transaction—the tenant whose estate is under audit. Joint bank accounts cause particular trouble, because the problem of proving the nature of the withdrawals is added to that of proving the source of the deposits.⁹

If title to property is taken in joint names with the right of survivorship, you should insist in all cases that a contemporaneous memorandum be prepared showing the source of the consideration paid or transferred. Also, a record should be maintained to show which tenant makes mortgage payments or further contributions.

Ohio Inheritance Tax

Ownership of joint and survivorship property by any persons other than husband and wife is penalized under the Ohio inheritance tax by the imposition of tax upon the entire enhanced value of the property at the death of the first tenant. On the other hand, legislation enacted in 1957 taxes only half the value of joint property without regard to enhancement if the tenancy is between husband and wife.¹⁰ The touchstone for federal estate tax purposes—who furnished the consideration—is immaterial here.

Income Tax Basis to Survivor

A very serious detriment to the effective use of joint and survivorship property in estate planning was removed in 1954 by enactment of a provision giving the estate tax value as the income tax basis to the

⁶ *Cleaver v. Long*, 126 N.E.2d 479 (Ohio C.P. 1955).

⁷ Revenue Act of 1916, § 202(c).

⁸ INT. REV. CODE OF 1954, § 2040.

⁹ See *McGrew's Estate v. Commission*, 135 F.2d 158 (6th Cir. 1943); Arthur J. Brandt, 8 CCH Tax Ct. Mem. 820 (1949).

¹⁰ OHIO REV. CODE § 5731.02(E) (1953), as amended by Amended Senate Bill No. 160 (1957).

surviving tenant.¹¹ In years prior to the 1954 Code, joint and survivorship property did not get a stepped-up basis even though taxed in the estate of the tenant who died first. Correction of this unfair and illogical rule eliminates one of the substantial arguments against the use of joint and survivorship property in these times of rising price levels.

Gift Tax Questions

Before enactment of the 1954 Code, the inconsistent approaches taken by the estate tax and the gift tax toward joint and survivorship property caused an unfortunate overlapping of tax.¹² As mentioned above, property law concepts are disregarded for estate tax purposes, and the value of the entire joint property is included in the estate of the tenant first to die, if such person furnished the consideration paid for the property. By contrast, creation of a joint tenancy with right of survivorship under such circumstances was a taxable gift to the extent of half the property.¹³ The 1954 Code changed this situation to provide that the creation of a tenancy by the entirety in real estate, defined in the gift tax regulations so broadly as to include the Ohio form of joint and survivorship property between husband and wife,¹⁴ is not a gift unless the donor so elects in a timely gift tax return.¹⁵ Enactment of this provision not only brings the estate tax and gift tax into partial conformity but also, in the words of Joseph Trachtman, "makes honest men out of . . . unwitting tax violators,"¹⁶ who did not realize that the creation of a joint tenancy with rights of survivorship was a taxable gift.

Lethargy, the natural inclination not to volunteer, and the advisability of deferring, perhaps permanently, the payment of gift tax or exhaustion of the lifetime exemption, will likely prevent most taxpayers from electing to treat the creation of joint and survivorship interests in realty as taxable gifts. Nevertheless, if the property is expected to increase in value, or the equity of the joint tenants is expected to increase substantially through payments on a mortgage, and, in either event, the parties expect that the tenancy will be terminated before death, making this election might well be advisable. If the election is not made, termination of the tenancy (other than by death) becomes the point at which the gift tax is imposed, and this gift is measured by the excess of the

¹¹ INT. REV. CODE OF 1954, § 1014(b)(9). Basis must be reduced by the amount of depreciation deductions, if any, allowed to the surviving tenant prior to the death of the decedent.

¹² The effects of such duplication were partially alleviated by the credit for gift taxes paid with respect to property included in the gross estate of the donor. INT. REV. CODE OF 1939, § 813; INT. REV. CODE OF 1954, § 2012.

¹³ If both parties made contributions, but in disproportionate amounts, the gift was measured by the excess of the proportionate interest received by the lesser contributor over his contribution.

¹⁴ Rev. Reg. § 25.2515-1(a).

¹⁵ INT. REV. CODE OF 1954, § 2515. Rev. Reg. § 25.2515-2(a).

¹⁶ TRACHTMAN, ESTATE PLANNING 176 (rev. ed. 1958).

proportionate part of the proceeds received by a spouse over the proportionate part of the consideration furnished by such spouse.¹⁷ Complications caused by the new rules, coupled with the fact that many taxpayers do not realize that taxable gifts can result from such interests, may mean that the honesty of Mr. Trachtman's unwitting violators may endure no longer than the tenancy.¹⁸

The gift tax rules are different for savings bonds and bank accounts. There is no gift upon the creation of a joint bank account or upon the purchase of a savings bond so long as the person supplying the consideration retains power to withdraw the deposited funds or to collect the bond.¹⁹ Instead, the gift is completed at the time the spouse who did not contribute withdraws funds from the account or redeems the bond; at this time, the revocable transfer becomes complete. No taxable gift is made when a wife withdraws funds to pay household expenses, for a direct payment from husband to wife for the same purpose would not be a gift.

Of course, all these gifts from one spouse to another, whether made on creation or on termination of the joint and survivorship interest in realty, on withdrawal of funds or on redemption of bonds will qualify for the gift tax marital deduction.²⁰

JOINT AND SURVIVORSHIP PROPERTY IN ESTATE PLANNING

Since taking title to property or establishing a bank account in joint tenancy with rights of survivorship saves probate expenses and transfers immediate title to the survivor, this form of ownership has definite advantages, particularly in the small estate.²¹ One substantial tax detriment has been eliminated by the 1954 Code, and now such property obtains a new basis if included in the estate of the tenant who dies first. Nevertheless, certain serious tax disadvantages remain, for inability to prove the relative contributions of the spouses may subject the property to tax in the estate of a joint tenant who contributed little or nothing to its acquisition. The problem of proof is particularly difficult in the case of joint bank accounts. Furthermore, gift tax considerations, lessened somewhat but not eliminated by the 1954 Code changes, suggest other forms of ownership. In larger estates, trusts can secure the same advantages as joint and survivorship property without its disadvantages.

Applying these general principles to the specific Beaver case, the author would suggest the following program:

- (1) Mrs. Beaver should establish a separate bank account;

¹⁷ INT. REV. CODE OF 1954, § 2515(b); Rev. Reg. 25.2515-3.

¹⁸ See Lowndes, *Serious Gift Tax Problems Created by Termination of Joint Tenancies*, 5 J. TAXATION 208 (1956).

¹⁹ Rev. Reg. § 25.2511-1(g)(4); Mim. 5202, 1941-2 CUM. BULL. 241; but cf. Estate of Silverman v. McGinnes, *op. cit. supra* note 5.

²⁰ Rev. Reg. § 25.2523(d)-1.

²¹ See TWEED AND PARSONS, LIFETIME AND TESTAMENTARY ESTATE PLANNING 11 (rev. ed. 1955).

(2) Records should be prepared and preserved to show the source of the consideration for the Beaver residence and bonds;

(3) The Beavers should not purchase any further securities in joint names with rights of survivorship;

(4) Depending in part on facts not in the record, the present joint bank account might be converted into one in which Mrs. Beaver has a right to withdraw but no survivorship rights, and Mr. Beaver might have his government bonds reissued in his name;²² and

(5) Mr. and Mrs. Beaver should consider the advisability of converting their joint and survivorship residence into a tenancy in common.²³

²² Reissuance in Mrs. Beaver's name would be a taxable gift. Rev. Rul. 278, 1955-1 CUM. BULL. 471. Under the circumstances, this might be desirable. See Kohn, *Gift Planning to Save Taxes*, 20 OHIO STATE L.J. 61, 63-64 (1959).

²³ See *Sullivan v. Commissioner*, 175 F.2d 657 (9th Cir. 1949), which seemingly affords an unusual opportunity to transfer property without tax. Hopes that the Treasury might follow *Sullivan*, kindled by Section 20.2040-1(d) of the proposed estate tax regulations, were dashed by deletion of this paragraph in the final regulations. Rev. Reg. § 20.2040-1.